IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH JAIPUR

J U D G M E N T

Ram Karan & others V/S Raghunath and another

S.B. Civil Regular First Appeal No. 108/84 against the judgment and decree dated 22.9.1984 passed by Shri B.M. Bhojak, Addl. District Judge, Baran in Civil Suit No. 9/81.

Date of Judgment ::: **July 28, 2006**

Reportable:

PRESENT

HON'BLE MR. JUSTICE KHEM CHAND SHARMA

Mr. B.L. Mandhana for the appellants
Mr. C.L. Saini for the respondents

BY THE COURT;

This appeal under Section 96 CPC arises out of the judgment and decree dated 22.9.1984 passed by the learned Additional District Judge Baran, whereby the learned Judge has dismissed the plaintiffs suit for specific performance and permanent injunction.

The plaintiffs filed a suit for specific performance and permanent injunction against the defendants in relation to certain lands bearing Khasra Nos. 113, 116, 117, 120, 124, 128, 132, 133 and 138, the details of which have been mentioned in para Nos. 3 and 4 of the suit. As per the plaintiffs, the defendants agreed to sell the the aforesaid land

for a consideration of Rs. 18,000/-, against which the plaintiffs paid a sum of Rs. 10,000/- and the defendants executed an agreement to sell on 31.8.79. The possession of some of khasras was delivered on the same day and possession of rest of khasras was promoised to be handed over on `Akhateej'. According to the plaintiffs they paid Rs. 2500/- on different dates and the defendant No.2 issued receipt in token thereof. The plaintiffs averred that they were ready and willing to pay rest of the sale price. However, the defendants went on avoiding receipt of remaining amount on one pretext or the other despite repeated requests by the plaintiffs to accept the remaining amount and to get done registry of the sale in their favour.

The defendants served upon the plaintiffs a notice on 4.4.1981 alleging that the disputed land was mortgaged with the plaintiffs for Rs. 10,000/- and Rs. 8000/- were outstanding towards mortage amount. It was stated that possession of the land be returned. According to the plaintiffs the notice of the defendants was baseless and they, through their advocate, got served a notice on defendants No. 1 and 2 stating that they are ready and willing to pay rest of the amount. Despite completion of the notice period, the defendants failed to get the sale deed

registered in favour of the plaintiffs and therefore, the plaintiffs are entitled for a decree of specific performance.

The defendants filed written statement and denied the averments of the suit. The trial court, on the basis of pleadings of the parties, framed issues and at the conclusion of trial, dismissed the plaintiffs' suit.

I have heard learned counsel for the parties and gone through the impugned judgment and the record of the case. A perusal of the impugned judgment shows that trial court has divided issue No. 1 in three parts viz., (i) whether the defendants agreed to sale the land in dispute for Rs. 18,000/-, (ii) whether in pursuance of the above transaction, the defedants executed agreement Ex.4, and (iii) whether at the time of execution of agreement to sale, Ex.4, Rs. 10000/- in cash were paid to the defendants. On consideration of evidence, the trial court decided first two parts in favour of the plaintiffs and third part, against the plaintiffs,

Issue No.2 was decided in favour of the plaintiffs, while issue No.3 was partially decided in favour of the plaintiffs, holding that the plaintiffs were in possession of the land bearing Khasra Nos. 124,128,132,133 and 138 prior to 31.8.1979. Issue No.

4 was decided in favour of the plaintiffs, while issue No. 5 was decided against them. Issue No. 5 was decided against the plaintiffs, holding that the plaintiffs could not prove the payment of Rs. 2500/- to the defedants. Issue No. 6 was decided in favour of plaintiff, holding that he was ready and willing to pay to the defendants a sum of Rs. 5500/-i.e. The balance amount of sale consideration. However, the learned trial court dismissed the plaintiffs' suit on the ground that the plaintiffs could not prove the payment of Rs. 10,000/- and Rs. 2500/-. According to the trial court, the plaintiffs could prove the payment of Rs. 2000/- only as against Rs. 10,000/- and Rs. 297 as against Rs. 2500/-. Thus the balance amount as against sale consideration, which remained due to be paid was 8000/- + 2203/- + 500/-, totalling to Rs. 15,703/- (Rs. 15503/- have wrongly been mentioned in the judgment). The trial court concluded that the plaintiffs neither pleaded nor could prove that he was ready and willing to pay Rs. 15,703/- to the defendats as the balance amount of sale consideration of Rs. 18,000/-.

In view of above, the sole controvery centres round the disputed questions of fact, namely, (i) whether the amount of Rs. 10,000/- was paid at the time of execution of agreement Ex.4 and (ii) whether

the amount of Rs. 2500/- was paid by the plaintiffs to the defendants on different dates ?

In para 5 of the plaint, the plaintiffs have made a specific averment that the defendants executed an agreement to sell on 31.8.1979 after they received a sum of Rs. 10,000/- in cash as against the sale consideration. The defendants in para 5 of their written statement have categorically stated that neither the plaintiffs paid Rs. 10000/- nor they received any sum. The plaintiffs have tried to prove this averment by adducing evidence. PW1 Ram Karan plaintiff himself has stated in his examination in chief that out of the sale consideration of Rs. 18,000/-, a sum of Rs. 10000/- was paid in cash. In cross examination, the witness has stated in specific terms that Rs. 10,000/- were paid in cash at the time of execution of agreement to sell, Ex.4. At the end of cross examination, the witness stated that Rs. 10000/- were paid to Raghunath and Benya and thereafter they executed agreement to sell Ex.4. PW2 Ajeem Khan, scribe of document Ex.4 in his examination in chief has stated that Raghunath and Benya agreed to sell the land for a consideration of Rs. 18,000/-, out of which Rs. 10,000/- were paid in cash and balance amount of Rs. 8,000/- was to be paid at the time of registration of the sale deed.

However, in cross examination witness Ajeem Khan has specifically deposed that Rs. 2000/- were paid in his presence at the time of execution of agreement to sell Ex.4. He further stated that Raghunath and Benya defendants accepted to have received Rs. 8000/- prior to it. It is thus not proved from the statement of PW2 Ajeem Khan that Rs. 10,000/- were paid to the defendants at the time of execution of document Ex.4. PW4 Kishore is a witness to agreement to sell Ex.4. He has stated that at the time of execution of documents, both the defendants agreed to receive Rs. 10,000/-. In cross examination the witness stated that there was no cash transaction of Rs. 10,000/-in his presence. Only the taking of money was admitted.

Thus, totality of the evidence discussed above leads to draw an inference that an amount of Rs. 10,000/- was not paid by the plaintiffs to the defendants. One witness states that Rs. 2000/- were paid in his presence, while another witness states that nothing was paid in his presence. The specific case of the plaintiffs was that at the time of execution of document, Ex.4 they paid to the defendants a sum of Rs. 10,000/- in cash. However, the fact remains that both the witnness have not supported this fact. It may further be stated that it is also not the case of the plaintiffs that they paid

Rs. 10,000/- in two instalments of Rs. 8,000/- and 2000/-. In this view of the matter, I am of the firm view that trial court has rightly concluded that Rs. 2000/- only were paid at the time of execution of agreement to sell, Ex.4.

So far as question of payment of Rs. 2500/- by the plaintiffs on different dates is concerned, the trial court, on consideration of evidence, has concluded that Rs. 297/- only were paid. PW3 Chanda Lal has stated Tehrir, Ex.5 was got written by defendant Benya, by which he admitted to have received a sum of Rs. 2203/- in different dates, while Rs. 297/- were paid in his presence. The witness made it clear that he had written the above Tehrir at the instance of Benya and Benya put his thumb impression at place `X' of Ex.5. Plaintiff Ramkaran has stated that he paid to the defendants a sum of Rs. 2500/- on different dates and defendant Benya, in turn, extended a consolidated receipt Ex. 5 and put his thumb impression. In cross examination, defendant Benya has stated that niehter he issued any receipt of Rs. 2500/- nor received the said sum. On being confranted with portion A to B of reply to the stay application, the witness stated that he did not write portion A to B of Ex. 12 i.e. plaintiffs had paid Rs. 2500/- as against profit of the land. In

para No. 9 of the stay application the plaintiffs have stated that defendants No.1 and 2 had received Rs. 2500/- on different dates and that Benya had executed a receipt against the said payment. In reply it has been stated that Rs. 2500/- were paid as against the profit of land. The defendants have not been able to prove by adducing evidence that what was the profit which they had received and therefore, it must be presumed that defendants had received Rs. 2500/- on different dates. The receipt of payment of Rs. 2500/- is proved by the evidence of Chand Lal and the receipt, Ex.5. The trial court has failed to consider this aspect of the matter in its judgment.

From what has been discussed above, it must be concluded that out of Rs. 18,000/- that plaintiffs have paid Rs. 2000/- and 2500/- only and they had to pay to the defendants the balance amount of Rs. 13,500/-, for which neither the plaintiffs have pleaded nor that they were ready and willing to make payment of the balance of Rs. 13,500/-. Unless the readiness and willingness of the plaintiffs was to pay the entire balance of the purchase money, they are not entitled to a decree for specific performance. Irrespective of any other fact, the averment in the plaint is sufficient to hold that they were not ready and willing to perform their part

of the obligation under agreement to sell Ex.4. The plaintiffs were not ready and willing to perform their part of contract. I find myself in support with the decision of Andhra Pradesh High Court in *Kommisetti Venkatasubbayya Vs. Karamsetti Venkateswarlu and others* (AIR 1971 A.P. 279). In this case, the plaintiff had averred in the plaint that he had paid a sum of Rs. 1500/- on 10.10.1960, which was found to be false. The court held:

> "In stating that he was ready and willing to perform his part of the contract, it must be taken that he was ready and willing to pay Rs. 272.50 which was the balance payable according to him under Ex.1 andnot that he was ready and willing to pay Rs. 1772.50 which was due and payable by the plaintiff, according to the finding of the courts below. Unless the readiness and willingness of the plaintiff was to pay the entire balance of the purchase money, he is not entitled to a decree for specific performance. In issuing demand notice dated 10.10.1961 also what he could have meant was that he was ready and willing to pay Rs. 272.50 and not Rs. 1772.50 that was really due from him. Iorrespective of any other fact, the averment in the plaint and the notice is sufficient to hold that he was not ready and willing to perform his part of the obligation under Ex. A-1. That apart, the plaintiff who seeks equitable remedy of specific performance must come to the court with clean hands".

As already observed, the averment in the plaint that plaintiffs have paid Rs. 10,000/- has been found

to be not true. Therefore, it must be taken that they were ready and willing to pay Rs. 5500/- which was the balance payable according to them under agreement to sell and not that they were ready and willing to pay Rs. 13,500/- which were in fact due to be paid to the defendant. Hence they were not ready to perform their part of the obligation.

Consequently, this appeal being devoid of merit is liable to be dismissed and is dismissed accordingly, with no order as to costs.

(Khem Chand Sharma), J.

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